on the subject right of way. Under 49 C.F.R. § 1152, *et seq.*, while there can be no "local traffic" for two years at the time the petition for exemption is filed, there can still be "overhead traffic" which can be rerouted if there is an effective rails-to-trails conversion or abandonment of the line. 49 C.F.R. § 1152.50(b).

II. Practical Application of NITUs or CITUs

Under its conditional terms, a NITU or CITU can lead to a number of possibilities.

The issuance of a NITU or CITU can, of course, serve as authorization to convert the line to trail use or to fully abandon an unwanted segment of right of way, §§ 1152.29(d), (e)(2), with any attendant property interests thereto restored to their owner. *E.g.*, *Preseault I*, 494 U.S. at 20-21 (O'Connor, J., *concurring*). The STB's conditions are formulaic and recited in a typical NITU or CITU:

> If an agreement for interim trail use/rail banking is reached by the 180th day after service of this decision and notice, interim trail use may be implemented. If no agreement is reached by the 180th day, UP may fully abandon the line.

Union Pacific R.R. Co.–Abandonment Exemption–In McPherson County, KS (McPherson Branch), STB Docket No. AB-33 (Sub-No. 89X), *NITU*, 1995 WL 569357, at *2 (ICC, Sept. 28, 1995) ("*UP NITU*").

During the pendency of a NITU, trains may still be running on the right of way. *Id.* at *1 (noting the railroad's continued plans for use of the right of way for "overhead traffic."). Other use conditions for the railroad right of way may concurrently be pending, where in lieu of trail use, for example, other railway transportation purposes may be implemented. *Id.* (noting authorization of a public use condition).

A NITU or CITU may mark the start of a period lasting six or more years, where no trail use conversion is consummated during that period. *See Southern Pac. Transp. Co.–Abandonment Exemption–Wendel-Alturas Line in Modoc and Lassen Counties, CA, Decision*, Docket No. AB-12 (Sub-No. 184X), 2004 WL 1941838 (STB, Service Sept. 1, 2004) (extending the NITU negotiating period until September 3, 2005–more than nine years after the first NITU was served and without consummation of trail use); *CSX Transp., Inc.–Abandonment Exemption–In Franklin County, PA, Decision*, Docket No. AB-55 (Sub-No. 568X), 2005 WL 189881 (STB, Service January 28, 2005) (extending authorization to abandon the line until September 27, 2005, and the trail negotiating period until July 29, 2005–more than six years after the first NITU was served and without consummation of trail use).

A NITU or CITU, can result in a mixed outcome, such as in Texas, where not until eight years after its issue, did a CITU lead to a trail use on part of the segment, with the rest subject to authorization for full abandonment and where thirteen years after the original CITU, the trail use authorization was revoked and the entire segment was subject to authorization for abandonment. *St. Louis Southwestern Ry. Co.–Abandonment Exemption–In Smith and Cherokee Counties, TX, CITU*, Docket No. AB-39 (Sub-No. 12), 2002 WL 383570 (STB, Service March 12, 2002).

SUMMARY OF THE ARGUMENT

Under *Caldwell*, the rule of law in all rails-to-trails cases is that a taking accrues *before the indispensable event to fix the Government's liability has occurred.* The *Caldwell* majority reached this result by violating rules set out in Supreme Court precedent including, *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, 535 U.S. 302, 322-23 (2002), *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), and *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978). Overlooking controlling precedent, the court applied

half-formed regulatory takings principles to a physical takings case and physical takings jurisprudence to an indeterminate regulatory proceeding. The result is a novel rule of law which violates this Court's pronouncements on regulatory and physical takings jurisprudence and conflates the two into a vague, unworkable hybrid.

The novel rule affects potential claimants for tens of thousands if not hundreds of thousand of homes and properties across the nation. The rule invites unripe claims–in some cases requires them–and precludes those that have not been brought during indeterminate agency proceedings under a NITU and before a taking is fixed. As explained below, the *Caldwell* court arrived at this rule because it failed to apply well-settled principles that separate physical from regulatory takings cases. This rule of law should be reviewed by the Court because it controls all takings cases brought against the United States that involve the Trails Act and any other, analogous claims over which the Federal Circuit has exclusive control.[7]

1. Proof of Liability. A rails-to-trails takings case hinges entirely on the plaintiff being able to establish that the rail carrier's transfer of its interests to recreational use worked a taking of her property. *Preseault I*, 494 U.S. at 20-21; *Preseault v. United States,* 100 F.3d 1525, 1549-50 (Fed. Cir. 1996) ("*Preseault II*"); *Toews v. United States*, 376 F.3d 1371, 1376 (Fed. Cir. 2004). That transfer of interest and change from railroad use to recreational use along a linear park puts a new and different burden on the servient estate, entitling the plaintiff to just compensation. *E.g.*, 376 F.3d at 1376. Without such showing, the government is not liable. *See id.* It is axiomatic, therefore, that this *indispensable* event to establish liability–rails-to-trails conversion–fixes the date for the accrual of a claim. The *Caldwell* majority failed to consider that a takings claim

[7] There can never be a "split" in circuits on point because the Federal Circuit has exclusive jurisdiction over all takings cases brought against the United States. *See* 29 U.S.C. § 1295(a)(2) (2004).

based on a NITU decision alone would be unripe, and in so doing it erred.

2. Per Se Physical Taking. A rails-to-trails takings claim falls under the category of a *per se* physical taking. As a physical takings claim, it is subject to the analyses and rules set out by this Court in physical appropriation cases, and regulatory takings analyses should not be applied. *Tahoe-Sierra*, 535 U.S. at 322-23. Under physical takings jurisprudence, until conversion from railroad use to recreational trail use pursuant to a NITU is consummated, there is no effective physical appropriation of a landowner's property. Until then, no third party is physically intruding upon or occupying the landowner's property. Therefore, a rails-to-trails claim can accrue no earlier than the effective date of transfer of the railroad's interest to a trail manager pursuant to federal authority. The *Caldwell* majority impermissibly fashioned an amalgam of regulatory and physical takings concepts and thereby overlooked the critical flaw in its holding: a conditional NITU cannot mark the start of a physical takings case.

3. Regulatory Takings Test. As issued, a NITU or CITU will not pass a regulatory takings analysis under the *Lucas* and *Penn Central* factors and therefore cannot mark the accrual of any takings claim. In most, if not all, rails-to-trails conversions the right of way burdens only a portion of a property and there is no "total taking" under *Lucas*. And the circumstances of a NITU or CITU cannot satisfy the *Penn Central* factors. First, there is no economic impact to the property until the trail conversion is consummated. Until then the "before and after" analysis remains the same with an existing, unabandoned railroad burdening the property both before and after issuance of the NITU/CITU. Second, under the investment-backed expectation test, the landowner would need to show he bought his property in reliance on the nonexistence of the challenged regulation. The Trails Act has been in existence for decades and other regulations potentially blocking abandonment even longer. *Cf. Preseault I*, 494 U.S. at 5-8.

Moreover, a NITU does not mark a point where proceedings are effectively final under the rubric of regulatory takings jurisprudence because it contains express conditions which must be satisfied before any conversion is authorized. The *Caldwell* majority failed to consider *whether* the issuance of a NITU could ever rise to a regulatory taking claim before its conditional terms are satisfied. The court avoided this question by reasoning that if no trail use is reached, a NITU could support a temporary taking. This predicate to the *Caldwell* rule of law is in direct violation of this Court's holding in *Tahoe-Sierra* concerning a "temporary" regulatory taking.

For these separate reasons, the *Caldwell* holding–"the appropriate triggering event for any takings under the Trails Act occurs when the NITU is issued," thereby "halting abandonment and the vesting of state law reversionary interests," 391 F.3d at 1235–is contrary to controlling precedent and should be reviewed by this Court and reversed.

ARGUMENT

I. A CLAIM CANNOT ACCRUE UNTIL THE INDISPENSABLE EVENT FIXING LIABILITY TRANSPIRES.

In rails-to-trails takings cases, the question of liability hinges on showing that the original railroad easement was put to a use different from the one permitted under the original grant. *Toews*, 376 F.3d at 1376 (observing the "defining issue in [a rails-to-trails takings] case is the question of the scope of the easements originally granted to the railroad."); *see also, Preseault I*, 494 U.S. at 20 ("state law determines what property interest petitioners possess and [] traditional takings doctrine will determine whether the Government must compensate petitioners for the burden imposed on [the] property"); *id.* at 21 ("reference to state law has guided other courts seeking to determine whether

a railway right of way lapsed upon the conversion to trail use."). Without that showing, the claim will fail. *See id.*; *compare Preseault II, supra, with Chevy Chase Land Co. v. United States*, 733 A.2d 1055 (Md. 1999) (holding rails-to-trails conversion not a taking where, under Maryland state law, the railroad easements were sufficiently broad to contemplate trail use). It is axiomatic, therefore, that a rails-to-trails taking claim cannot accrue until a new "burden [is] imposed on any property interest they possess, i.e., when the "railway right of way lapsed upon the conversion to trail use." *See Preseault I* , 494 U.S. at 20-21.

Until that point, and while a "dual-purpose" NITU issued by the STB permitting *either* abandonment *or* recreational trail use is pending, the requisite elements to establish a taking are not satisfied. During the pendency of a NITU, the railroad is still responsible for taxes on the right of way. 2 I.C.C.2d at 608. In addition, the right of way may still be used for overhead traffic by the railroad company itself. *UP NITU,* 1995 WL 569357, at *1. And if there is a public use condition pending, *id.*, then the right of way may end up being transferred to another party for non-trail purposes. Even if none of those activities are taking place, the law requires *more* than the events transpiring before and during the pendency of a NITU to support a takings claim. *E.g., Preseault I, Preseault II, Toews, supra.* The law requires proof that the trail conversion was outside the scope of the original railroad use which, by necessity, means the NITU alone cannot trigger a taking.

As such, the *Caldwell* court's holding must be reviewed and reversed.

II. A RAILS-TO-TRAILS TAKING ACCRUES NO EARLIER THAN WHEN THE PROPERTY IS PHYSICALLY APPROPRIATED.

Physical takings doctrine, and not regulatory takings jurisprudence, applies in analyzing liability in a rails-to-trails case. *Preseault II*, 100 F.3d at 1540 (rejecting the government's theories of liability under any regulatory takings jurisprudence: "[p]lacing restraints on an owner's use of her property invokes the regulatory takings issue, rather than the question of the Government's physical occupation of private property, and both factually and legally raises significantly different issues."). That finding is consistent with *per se* takings jurisprudence as has been explained by this Court over the decades. *E.g., Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982); *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 832 (1987); *Tahoe-Sierra*, 535 U.S. at 322-23.

In *per se* physical takings cases, courts must observe the distinctions between physical and regulatory takings jurisprudence. Just as those distinctions are critical in determining *whether* there has been a taking, *Tahoe-Sierra*, 535 U.S. at 322-23, the distinctions apply in evaluating *when* the taking occurred. *Cf. id.*; *see Clark v. United States*, 445 U.S. at 253, 258 (1980).

In *Tahoe-Sierra*, the Court explained the importance of keeping the two analyses separate:

> This longstanding distinction between acquisitions of property for public use, on the one hand, and regulations prohibiting private uses, on the other, makes it inappropriate to treat cases involving physical takings as controlling precedents for the evaluation of a claim that there has been a "regulatory taking," and vice versa.

Id. at 322-23; *see also id.* at 330 n.25; *Preseault II*, 100 F.3d at 1540 ("As the Supreme Court makes clear, these two quite different situations call for quite different analyses.").

The Court's admonishment not to confuse the two takings paradigms should apply squarely to questions concerning *accrual* of a takings claim. This Court's discussions concerning physical takings cases support no other conclusion and the rule has been stated generally by the Court itself.

In *Clark, supra*, the Court considered whether the physical appropriation of allotted Indian trust lands pursuant to a condemnation statute, but without the initiation of condemnation proceedings, constituted permissible *per se* physical takings under the rubric of "inverse condemnation" theories. 445 U.S. at 256-8. The Court concluded the taking was not authorized and based the decision in part on the question of *when a physical taking by invasion can be deemed to accrue*:

> When a taking occurs by physical invasion, on the other hand, the usual rule is that *the time of the invasion* constitutes the act of taking, and "[i]t is that event which gives rise to the claim for compensation *and fixes the date* as of which the land is to be valued.

Id. at 258 (quoting *Dow v. United States*, 357 U.S. 17 (1958)) (emphases added); *cf. Loretto*, 458 U.S. at 426 ("'the character of the government action' not only is an important factor in resolving whether the action works a taking *but also is determinative*") (emphasis added); *Nollan*, 483 U.S. at 832 ("'a permanent physical occupation' [] occur[s], for purposes of th[e *Loretto*] rule, where individuals are given a permanent and continuous right to pass to and fro . . .").

In any rails-to-trails case, the property is not physically appropriated by the Government, of course, but by a trail manager acting pursuant to the Government's authority. *E.g., Preseault II*, 100 F.3d at 1551. The earliest a trail manager acquires the right to physically occupy a right of way and invite the public to pass to and fro is when the railroad transfers its interests to the manager pursuant to a NITU. § 1247(d). Until that transfer, the railroad, who has typically owned the

corridor spanning centuries, continues as the sole owner and occupier of the right of way. *See* 2 I.C.C.2d at 608. The NITU affords no more rights to the trail manager and the public to occupy the right of way than they had prior to its issuance. *Cf. id.*

In *Caldwell*, the court did not undertake an analysis rooted in *per se* physical takings law nor for that matter in regulatory law and instead appeared to conflate the two. The court recognized that "[t]he task of finalizing the trail use agreement under the Trails Act falls entirely on the railroad and trail operator," but emphasized that "the issuance of the NITU is the only *government* action in the railbanking process." 391 F.3d at 1233-34 (emphasis in the original). But while the issue of the advent of the governmental action may have relevance in establishing the date of accrual in a regulatory taking case *if* the governmental action is *final*, *see* § III, *infra*, the governmental action in a *per se* physical taking is not definitive for the taking. Rather, the physical occupation is. *See Clark, supra*; *Dow v. United States*, 357 U.S. 17, 22 (1958) ("The owner at the time the Government takes possession 'rather than the owner at an earlier or later date, is the one who has the claim and is to receive payment.'") (quoting *23 Tracts of Land, Etc. v. United States*, 177 F.2d 967 (6th Cir. 1949)).

Although recognizing that *Dow* stands for the proposition that liability is fixed, and therefore accrues, at the time of physical intrusion, *Caldwell* 391 F.3d at 1235; *see also, id.* at 1238-9 (Newman, J., *dissenting*), it appears the majority failed to consider that the intrusion in a rails-to-trails case is made by third parties, not the government. As such, the majority did not address when the *third-party* physically appropriated the property. The result from the court's misapplication of regulatory takings law concepts to this physical takings case is the issuance of an unworkable rule of law. Accordingly, the *Caldwell* decision should be reviewed and reversed.

III. A NITU WILL NOT SUPPORT A REGULATORY TAKING AND THEREFORE CANNOT MARK THE ACCRUAL OF A CLAIM.

The issuance of a NITU alone will never, under normal circumstances, give rise to a takings claim. The facts in a rails-to-trails taking do not fit a *Lucas* analysis, nor do they meet the *Penn Central* factors. Moreover, until the conditions set out in a NITU are fully satisfied, there is no "injury in fact" as required to satisfy the finality rule and establish ripeness under regulatory takings jurisprudence. Therefore, the *Caldwell* analyses and holding fails because the Court overlooked and misapplied the controlling precedent on point.

A. A RAILS-TO-TRAILS CLAIM IS NOT SUBJECT TO A *LUCAS* TAKING FRAMEWORK AND WOULD FAIL A *PENN CENTRAL* TEST.

The *Caldwell* decision ultimately suffered from a failure to engage in an appropriate regulatory analysis: "The starting point for the court's analysis should have been to ask whether there was a total taking of the entire parcel; if not, then *Penn Central* [would be] the proper framework" for determining whether there could be any taking at the time a NITU was issued. *See Tahoe-Sierra*, 535 U.S. at 335. This rule applies whether the taking is permanent or temporary, *id.* at 342, because temporary takings are "no[] different in kind from permanent takings." *Wyatt v. United States*, 271 F.3d 1090, 1097 n.6 (Fed. Cir. 2003).

In a rails-to-trails case, there is no "total taking of the entire parcel," as required under the *Lucas* test. To qualify under *Lucas,* there must be "a 'complete elimination of value,' or a 'total loss'" of the entire, larger parcel–not just the strip of land that is taken. *Tahoe-Sierra*, 535 U.S. at 330 (quoting *Lucas*). Accordingly, unless the NITU caused a temporary or permanent

"total loss" of the remainder of the property,[8] the *Penn Central* analysis *must be applied. Tahoe-Sierra*, 535 U.S. at 330, 342.

Under the *Penn Central* analysis, the court shall weigh and factor three relevant issues: (1) the economic impact of the regulation on the claimant; (2) the extent to which the regulation has interfered with distinct investment backed expectations; and (3) the character of the governmental action. *See Tahoe-Sierra*, 535 U.S. at 315, n.10. A takings claim predicated on the issuance of a NITU would fail both of the first two tests, and therefore does not give rise to a regulatory takings claim.

"The existence of economic injury is indispensable to demonstrating a regulatory taking." *Seiber v. United States*, 364 F.3d 1356 (Fed. Cir. 2004). To demonstrate economic injury, there must be an appreciable change in the fair market value of the property before and after the injury. *Id.* at 1371. In the case of a NITU, however, the "before" condition includes an existing railroad right of way and the "after" condition is unchanged. *See generally*, 49 C.F.R. § 1152, *et seq.*; § I, *supra*.

Not until the time of the rails-to-trails conversion is there a difference in the value of the "before and after" condition. Only then will there be a lapsed railroad easement–marking the "before" period–and the newly placed recreational trail–marking the "after" period. *Cf. Moore v. United States*, 54 Fed. Cl. 747 (2002) (addressing damages in a rails-to-trails takings claim); *see also Preseault II*, 100 F.3d at 1549-50. As such, a pending NITU fails the first test.

Moreover, under the second test, the Government's historical position on point has been that the Trails Act is not violative of a landowner's "reasonable expectations." *Preseault II*, 100 F.3d at 1540 ("The Government's attempt to read the concept of 'reasonable expectations' as used in regulatory

[8] In Counsel's experience, a rails-to-trails taking does not result in a taking of the entire remainder although it is conceivable that a *Lucas*-type taking may occur in atypical circumstances.

takings law into the analysis of a physical occupation case would undermine, if not eviscerate, long-recognized understandings regarding protection of property rights.").

Putting aside the Government's view, for a regulatory taking claim to be viable a property owner would have to show he "bought his property in reliance on the nonexistence of the challenged regulation." *Creppel v. United States*, 41 F.3d 627, 632 (Fed. Cir. 1994). This test would require property owners subject to a NITU to establish that their investment-backed expectations were violated by regulations that carve out a discreet window of time where *either* abandonment or trail use may transpire subject to the NITU's conditions being met. They could never meet that burden. Railroads have been subject to various types of regulations restricting the ability to abandon outright their right-of-way interests for decades and at least since the 1920's. *See Hash v. United States*, 403 F.3d 1308, 1317 (2005) (describing federal control over railway corridors). Therefore, unless the Landowners purchased their properties before the 1920's, they would be hard-pressed to establish the violation of their investment-backed expectations due to an agency decision that allowed for proceedings that might lead to full abandonment of the right of way.

B. A Conditional NITU Fails the Finality Test.

The NITU is not "final" under the rubric of regulatory takings jurisprudence: *conditions* are set by the NITU to satisfy the requirements under the Trails Act for trail use and those conditions are not met until there is an effective, consummated agreement between the railroad and trail manager.[9] *See* Statement of the Case, *supra*. In addition, the right of way may end up fully abandoned, may still be used for railroad purposes while the NITU is pending, there may be changes in

[9] An agreement is typically consummated at the time the railroad sells its interests to the trail sponsor, or when that sale is recorded, depending on applicable state law. *Caldwell*, 391 F.3d at 1237 (Newman, J., dissenting).

trail sponsors and revocation of previous NITUs, and there may be concurrent public use conditions which can result in non-trail use. *See id.* Therefore, a NITU is by no means final in its application and the outcome will be unknown until all the conditions of the NITU are satisfied.

C. A NITU Cannot Support a Temporary Taking

Without analyzing the finality rule, the *Caldwell* Court held "[t]he NITU marks the 'finite start' to either temporary or permanent takings claims by halting abandonment and the vesting of state law reversionary interests when issued." 391 F.3d at 1235. In so holding, the Court not only failed to consider whether a regulatory analysis *could* apply but overlooked whether the NITU was effectively final under the meaning found in regulatory jurisprudence. Instead, the Court seemingly engaged in circular reasoning, and held that the NITU "operate[d] to preclude abandonment" because that marked the point where state law reversionary interests were "forestalled by operation of the . . . Trails Act." *Id.* at 1233.

But the halting of abandonment for a limited period of time under a NITU no more gives rise to a taking claim than a regulatory action temporarily suspending property development in and of itself works a taking. *See Tahoe-Sierra*, 535 U.S. at 331. To begin with, "of course, defining the property interest taken in terms of the very regulation being challenged is circular. With property so divided, every delay would become a total ban; the moratorium and the normal permit process alike would constitute categorical takings." *Id.* In addition, "[a] rule that required compensation for every delay in the use of property would render routine government processes prohibitively expensive or encourage hasty decisionmaking. Such an important change in the law should be the product of legislative rulemaking rather than adjudication." *Id.* at 335.

That the *Caldwell* decision missed the finality analysis is perhaps due to its misapplication of *Dow*. The Court relied on *Dow* to conclude that even if a NITU *does not lead to trail use*,

it nevertheless will mark the accrual of a "temporary" taking. 391 F.3d at 1234 ("negotiations may fail, and the NITU would then convert into a notice of abandonment. In these circumstances, a temporary taking may have occurred."). In support, the court reasoned, "[a]s the Court observed in *Dow*, the government's decision to abandon the taking 'merely results in an alteration in the property interest taken–from full ownership to one of *temporary use and occupation*.'" *Id.* at 1235 (quoting *Dow*) (emphasis added).

But the *Dow* Court's reasoning on this point hinged entirely and completely on a *physical occupation* to support a temporary taking. 357 U.S. at 26. In the absence of a *physical occupation*, only a regulatory takings analysis can apply. *Tahoe-Sierra*, 535 U.S. at 335. The *Caldwell* Court failed to recognize this critical and fatal distinction when concluding that the NITU potentially gave rise to a temporary taking and therefore failed to engage in the rigorous and complex analysis demanded by regulatory takings jurisprudence. If it had, it would have recognized that there can be no "temporary" taking under regulatory takings law. *See Tahoe-Sierra, supra.* Moreover, under regulatory takings jurisprudence, if an action is not effectively final, it is premature; therefore, no regulatory taking can accrue.

The *Caldwell* decision misapplies regulatory takings doctrine to a physical taking and physical takings doctrine to a regulatory proceeding in violation of this Court's jurisprudence. The result is an unworkable rule of law which should be reviewed and reversed by the Court.

CONCLUSION

For the foregoing reasons, under no circumstances could a NITU alone support any type of taking–physical, regulatory, temporary, or permanent. Therefore it is impossible for a rails-to-trails taking claim to accrue at the time a NITU is issued, unless there has already been a transfer of the interests from the railroad to the trail manager. Nonetheless, *Caldwell* establishes a rule of law which holds that a claim against the United States accrues *before the indispensable event to fix liability has occurred.* Accordingly, *Amici* Landowners join with Petitioners in urging this Court to issue a writ of certiorari to the United States Court of Appeals for the Federal Circuit in this case.

Respectfully submitted,

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